STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES PARKER,

Defendant-Appellant.

UNPUBLISHED
September 6, 2007

No. 272778
Wayne Circuit Court
LC No. 05-009425-01

Before: Cavanagh, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from a conviction of uttering and publishing, MCL 750.249, for which he was sentenced to five years' probation with the first year in jail. We affirm defendant's conviction but remand for ministerial correction of the judgment of sentence. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole claim on appeal is that the trial court erred in denying his motion for a directed verdict because the evidence failed to prove that the drawer's signature on the check at issue was false or that defendant knew that the account on which the check was drawn had been closed. Although defendant moved for a directed verdict, he did not challenge the evidence as it related to the elements of the offense, only as it related to his identity as the offender. But because the standard of review for a motion on a directed verdict is the same as that for the sufficiency of the evidence, and no special action is necessary to preserve a challenge to the sufficiency of the evidence, we will treat this issue as a challenge to the sufficiency of the evidence.

In reviewing the sufficiency of the evidence in a criminal case, this Court must review the record de novo and, viewing both direct and circumstantial evidence in a light most favorable to the prosecution, determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). Circumstantial evidence and reasonable inferences drawn therefrom are sufficient to prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). It is for the trier of fact to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). All conflicts in the evidence are to be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

"The crime of uttering and publishing consists of offering or passing a forged instrument as genuine, knowing the same to be false, with an intent to injure or defraud." *People v Peace*, 48 Mich App 79, 86; 210 NW2d 116 (1973). The elements of the offense are "(1) defendant's knowledge that the instrument was false, (2) an intent to defraud, and (3) presenting the forged instrument for payment." *People v Knowles*, 256 Mich App 53, 58; 662 NW2d 824 (2003), "overruled" on other grounds by *People v Melton*, 271 Mich App 590, 592; 722 NW2d 698 (2006).

Although the information charged defendant with passing a check that contained a false signature of the drawer, the prosecutor's theory of the case at trial was that defendant passed a check drawn on a closed account and the jury instructions were tailored to that theory. Absent a timely objection and a showing of prejudice, a court may not reverse a conviction because of a variance between the information and proof regarding the manner in which the offense was committed. MCR 6.112(G). Unacceptable prejudice includes unfair surprise, inadequate notice, or inadequate opportunity to defend. Cf. *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993). Defendant did not object to the variance below and has not shown that he was prejudiced by the variance. Defendant knew five months before trial that the prosecutor's theory of the case had changed and had an adequate opportunity to defend against the theory as presented at trial.

Regarding the issue whether defendant knew that the instrument was false, there was no direct evidence that defendant knew the account had been closed. However, the circumstantial evidence is sufficient to prove guilty knowledge. The evidence showed that defendant left the bank without waiting for his check to be cashed and without reclaiming his driver's license. Further, defendant gave an exculpatory statement to the police that was proved to be false. A false exculpatory statement is evidence of guilt. *People v Dandron*, 70 Mich App 439, 443-444; 245 NW2d 782 (1976). The evidence showed that someone who looked just like defendant, who was in possession of defendant's truck and driver's license, and who had a check endorsed with defendant's name and bank account number, presented the check and driver's license to the teller. Defendant, however, claimed that he had lost his driver's license a few weeks earlier and suggested that two friends may have taken his truck and gone to the bank to cash the check. Such evidence was sufficient to enable a rational trier of fact to find that each element of the crime had been proved beyond a reasonable doubt.

We note that the judgment of sentence erroneously indicates that defendant was convicted of only attempted uttering and publishing, MCL 750.92. Although defendant initially tendered a guilty plea to a reduced charge of attempt, that plea was withdrawn and the jury found defendant guilty of the greater offense at trial. Accordingly, we remand for correction of this error.

Affirmed and remanded for ministerial correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto